COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000324-D
(2012-CA-002218)

JOHN WESLEY BAYS, APPELLANT

v.

KNOX CIRCUIT COURT
2007-CI-00631, 2008-CI-00371, AND 2009-CI-00246

KRISTIE D. KIPHART, INDIVIDUALLY
AND AS TRUSTEE, OF THE DEMAND
RIGHT IRREVOCABLE TRUST FOR
BRYCE A. BAYS APPELLEE.

APPEAL FROM DECISION OF THE COURT OF APPEALS
BRIEF ON BEHALF OF APPELLEE,
KRISTIE D. KIPHART, INDIVIDUALLY AND AS
TRUSTEE OF THE DEMAND RIGHT IRREVOCABLE
TRUST FOR BRYCE A. BAYS

CERTIFICATE OF SERVICE

This is to certify a true and correct copy of the forgoing Appellee's Brief was transmitted, all expenses pre-paid, on this the 26th day of May 2015 to the following persons in accordance with CR 76. 12(5) and 76.12(6): Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. W. Patrick Hauser, P.O. Box 1900, Barbourville, KY 40906; Hon. Dave R. Collins, 203 Knox Street, Ste. 1, Barbourville, KY 40906; and on the same date an original and nine (9) true and exact copies were mailed to the Clerk of the Kentucky Supreme Court, Room 209, State Capitol, 700 Capital Ave., Frankfort, Kentucky 40601-3488. The record on appeal was not withdrawn by the Appellee.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee believes that an oral argument is unnecessary because the issues are adequately presented in the briefs. However, if this Court grants oral argument, Appellee would participate fully.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Pursuant to CR 76.12(4)(d)(iii), Appellee rejects Appellant's Statement of the Case in its entirety and submits the following Counterstatement of the Case. Carole Kiphart Bays ("Carole") was a successful Radiologist who married Appellant John Wesley Bays in 2000. The Bayses lived in Knox County, Kentucky, with their minor son, Bryce A. Bays. Unfortunately, Carole was diagnosed with cancer in 2006. (Knox Circuit Court Findings of Fact, Conclusions of Law, and Judgment, December 21, 2011, attached to Appellant's Brief as Appendix 2 (hereinafter "Judgment"), p. 2) On or about September 15, 2007, Carole created two trusts—(1) the Demand Right Irrevocable Trust for Bryce A. Bays and (2) the Carole Kiphart Bays Living Trust. (Judgment, p. 11-12) Carole designated the Demand Right Irrevocable Trust for Bryce A. Bays the beneficiary of a life insurance policy issued by American General Life Insurance Company with a death benefit of $750,000.00. She designated the Carole Kiphart Bays Living Trust the beneficiary of a life insurance policy issued by Prudential Insurance Company of America with a death benefit of $125,000.00. Prior to the creation of the trusts, John Bays had been named beneficiary of the life insurance policies, but Carole took the steps necessary to remove him as beneficiary in favor of the trusts. (Judgment, p. 12) John Bays was not named a beneficiary of the Demand Right Irrevocable Trust for Bryce A. Bays as Carole created this trust for the exclusive benefit of her son.

Carole died on October 28, 2007. (Judgment, p. 2) In November 2007, Carole's Last Will and Testament with holographic attachments (the "Will") was admitted to probate and her sister, Kristie D. Kiphart, was appointed executrix. Kiphart was also named trustee of the Demand Right Irrevocable Trust for Bryce A. Bays. Shortly thereafter, John Bays commenced a flurry of litigation designed to defeat his late wife's last wishes. In his first lawsuit, Civil Action No. 07-CI-631, John Bays renounced Carole's Will and sought to take his statutory share of her surplus real property and personal property. In his second lawsuit, Civil Action No. 08-CI-371, John Bays sought to recover missing money that he claimed he had given to Carole to be placed in their safe deposit box. In his final lawsuit, Civil Action No. 09-CI-246, John Bays sought to have the Will declared void because it was not executed in accordance with the statutory requirements of KRS 394.040. The Knox Circuit Court later consolidated these actions and declared the Will void. (Judgment, p. 6)

Years of litigation culminated in a bench trial in 2011, the Knox Circuit Court made the following relevant conclusions of law:

> 4. John Bays did not consent to nor did he have knowledge of the changing of the beneficiary on the life insurance policy in the sum of $750,000.00 with American General Life Insurance Company and the life insurance policy in the sum of $125,000.00 with Prudential Insurance Company. John Bays had no knowledge of nor did he consent to the establishment of the Demand Right Irrevocable Trust for Bryce Bays and Trust Agreement of Carole Bays that were funded by said insurance policies. These acts by Carole Bays constitute fraudulent inter vivos transfers.
>
> 5. The insurance policies, not being real estate, are personalty of the estate. . . . Therefore, the values of the insurance policies with American General Life Insurance Company in the sum of $750,000.00 and Prudential Insurance Company in the sum of $125,000.00 shall be considered personalty of the estate for the purpose of calculating John Bays [sic] statutory share of his wife's estate.

(Judgment, p. 15) The Knox Circuit Court entered judgment accordingly and awarded John Bays $437,500.00, one-half the total value of the two insurance policies at the time of his wife's death. (Judgment, p. 16)

The sole issue on appeal was whether the proceeds of life insurance policies pass through the decedent's estate such that the proceeds are personalty of the deceased subject to a surviving husband's curtesy interest pursuant to KRS 392.020. The Court of Appeals held that a surviving husband's curtesy interest does not attach to life insurance proceeds and, in a divided 2-1 opinion, reversed the judgment of the Knox Circuit Court. The Court of Appeals reasoned as follows:

> Simply put, the life insurance *proceeds* never were possessed by Carole, and therefore were never part of her estate. To argue otherwise is to ignore the fact that upon an insured's death, life insurance proceeds are automatically paid to the named beneficiary and do not pass through the estate—unless of course the estate is a named beneficiary.

(Opinion, attached to Appellant's Brief as Appendix 1, p. 9-10) (emphasis in original) The Court of Appeals engaged in a comprehensive analysis of case law from other states and found persuasive authority in support of its holding. It noted that the trial court's rationale would "create chaos in the realm of estate planning" and place insurance companies in the untenable position of facing a claim by a surviving spouse. (Opinion, p. 15) It further noted that Carole had "absolute authority to change the beneficiary of her life insurance policies without [John Bays'] knowledge or consent and did so according to the terms of the contracts." (Opinion, p. 15) Judge VanMeter dissented, noting "under the majority opinion, the wife has no recourse because of the 'magic' of life insurance and its status as a nonprobate asset." (Opinion, p. 23)

In his statement of the case, Appellant states that "Carole Kiphart Bays and . . . Kiphart ransacked the decedent's [i.e. Carole Kiphart Bays'] lock box and bank accounts . . . ." (Appellant Br. at 5) While it is a stretch to characterize Carole removing her own money and property from her own lockbox and bank accounts during her lifetime as "ransacking," neither party appealed any findings made with respect to the purported "ransacking" and that issue is simply not before this Court. Similarly, neither party appealed regarding the enforceability of Carole's Will and that issue is not before this Court. While Bays repeatedly and emphatically claims there has never been any evidence whatsoever to rebut his allegations of a comprehensive conspiracy to defraud him out of his late wife's property—a conspiracy apparently led by his late wife herself—the trial court did not find in his favor on every claim. (Judgment, p. 14-15) Regardless, the life insurance proceeds represent the bulk of the money that was in dispute.

After the Court of Appeals ruled against him, John Bays filed a Petition for Rehearing. The Court of Appeals denied the Petition for Rehearing. He then filed a Motion for Discretionary Review with this Court, which was granted on February 11, 2015.

ARGUMENT

I. THE COURT OF APPEALS DID NOT SET ASIDE FINDINGS OF FACT AND DID NOT ERR UNDER CR 52.01

A. The De Novo Standard of Review Applies to the Court of Appeals' Legal Conclusion

Appellant John Bays' first argument is that the Court of Appeals erroneously set aside the trial court's findings of fact in violation of CR 52.01 when it held that the surviving spouse's dower/curtesy interest does not attach to life insurance proceeds as a matter of law. CR 52.01 states in relevant part that:

> Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.

Bays' argument lacks merit because the pure legal question of whether a surviving spouse's interest attaches to life insurance proceeds cannot be recharacterized as a question of fact subject to the clearly erroneous standard of review of CR 52.01. Questions of law involve identifying and applying the correct legal principles. Questions of fact involve weighing the evidence, including the credibility of witnesses, the import that should be given to conflicting evidence, and inferences that arise from the evidence. The issue of whether a surviving husband's curtesy interest attaches to life insurance proceeds is a pure question of law because it involves a choice between two possible competing legal principles—a surviving husband's curtesy interest does not attach to life insurance proceeds where a third party is named beneficiary or, in the alternative, it does. This issue of the attachment of the interest in no way turns on the credibility of witnesses or any other weight-of-the-evidence considerations. Like any other legal issue, the issue of whether a surviving spouse's curtesy interest attaches to life insurance proceeds is subject to the de novo standard of review, not the clearly erroneous standard of review of CR 52.01. *E.g., McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008).

The Court of Appeals selected and applied the correct principle of law when it held that Bays' curtesy interest did not attach to the life insurance proceeds because that principle has long been the law in Kentucky. *Nat. Life & Acc. Ins. Co. v. Walker*, 246 S.W.2d 139, 140 (Ky. 1952) (holding that surviving wife had no claim to proceeds paid to mother of deceased pursuant to beneficiary designation because "the insured is authorized by the contract to change the beneficiary at his pleasure"); *Farley v. First Nat. Bank*, 61 S.W.2d 1059, 1061 (Ky. 1933) (rejecting widow's claim of fraud on the dower because "not until death does the right of the named beneficiary become vested"); *see also Nelson v. Met. Tower Life Ins. Co.*, 4 F. Supp.2d 683, 687 (E.D. Ky. 1998) (finding no fraud on the dower where deceased changed beneficiary from his wife to his mother because widow "was a revocable beneficiary, she did not have a vested interest in the insurance policy").

After recognizing Bays' curtesy interest did not attach to the life insurance proceeds as a matter of law, any finding of fact with respect to fraud on the spousal interest became irrelevant because it is impossible to defraud a nonexistent interest. The Court of Appeals expressly applied this logic in its well-reasoned Opinion: "because the proceeds had never been a part of Carole's estate, any determination of a curtesy interest, or fraud related to such an interest, is pointless." (Opinion, p. 12)

The trial court made its finding—later reversed by the Court of Appeals—that the life insurance proceeds were personalty of the estate under the heading "CONCLUSIONS OF LAW." (Judgment, p. 14-15) Nothing in the trial court's

Judgment suggests that it made a finding of fact that Bays' curtesy interest attached. Even if the trial court's ruling that fraud on the dower occurred could somehow properly be characterized as a finding of fact, any such finding of fraud was clearly erroneous because it was rendered in violation of clearly established Kentucky law as set forth in *Walker*, *Farley*, and *Nelson*. Therefore, any purported error by the Court of Appeals in the application of the standard of review was harmless.

Bays assumes throughout his argument that every aspect of the trial court's finding of fraud with respect to his curtesy interest is entitled to deference and he apparently bases this assumption on the Court of Appeals' brief recitation of the CR 52.01 standard of review. (Opinion, p. 5) Bays also points to the Court of Appeals' "reliance" on *Coffman v. Rankin*, 260 S.W.3d 767 (Ky. 2008), in its discussion of the standard of review. However, while the Court of Appeals briefly recited the CR 52.01 standard of review and cited *Coffman* as part of its recitation, it did not apply the CR 52.01 standard and it did not find that any fact found by the trial court was clearly erroneous. The Court of Appeals unequivocally held as a matter of law that Bays' curtesy interest did not attach, thereby rendering the trial court's findings of fraud moot. "[B]ecause we believe the trial court erred in its characterization of the life insurance proceeds as personalty, its finding of fraud is unnecessary and irrelevant." (Opinion, p. 6-7)

Bays has failed to offer any authority to support his position that the issue of whether a curtesy interest attaches is a finding of fact subject to the clearly erroneous standard of review of CR 52.01. He does not argue that the issue somehow turns on the credibility of witnesses or other evidence. There has never been a dispute that Bays was

Carole's surviving spouse, that Carole changed the beneficiary designation on her life insurance policies during her lifetime, and that the beneficiaries of these policies at the time of her death were trusts set up for the benefit of her minor child. He asserts that the Court of Appeals "apparently overlooked the fact that the basis of John W. Bays' case was a claim of fraud on the statutory interest of the surviving spouse and not simply the interpretation of an insurance policy or policies in an estate setting." (Appellant's Br. at 7) (emphasis omitted) The Court of Appeals did not overlook this consideration. It clearly noted that "[t]here can be no fraud on [Bays'] curtesy interest when there was no curtesy interest in the life insurance proceeds to possess." (Opinion, p. 10-11) The issue of whether Bays' curtesy interest attached to the life insurance proceeds is simply not a question of fact, the Court of Appeals did not find that any of the trial court's factual findings were clearly erroneous or otherwise incorrect, and Bays' CR 52.01 argument is inapposite.

B. Bays' argument that his statutory spousal interest was defrauded is not the issue before this Court

After arguing that the Court of Appeals misapplied CR 52.01, Bays claims that there were "multiple acts of deception and fraudulent behavior" by Carole and her sister, Kristie Kiphart. The question before this Court is whether the Court of Appeals erred by concluding that Bays' curtesy interest did not attach to Carole's life insurance proceeds where a trust was named beneficiary. Issues with respect to the validity of Carole's Will, the facts and circumstances surrounding dispositions of property Carole actually owned during her lifetime, Carole's decision to "ransack" her own property during her lifetime, and any of the many other allegations made by Bays simply are not before this Court.

Nevertheless, Appellee will briefly address Bays' contention that Carole defrauded his purported curtesy right with respect to the life insurance proceeds.

Bays argues that provisions in Carole's Will and the Trust Agreement barring statutory marital rights somehow caused the barred statutory marital rights to attach to the life insurance proceeds. Bays attempts to cast these provisions as some sort of admission or concession by the drafter that the life insurance proceeds were subject to Bays' curtesy interest. However, this argument misses the mark. The provision of the Will referenced by Bays addressed "all statutory rights [Bays] may have in [Carole's] estate" but it is silent with respect to life insurance proceeds. The Court of Appeals held that life insurance proceeds do not pass through the estate. Similarly, the referenced provision of the Trust Agreement addressed "all statutory marital rights [Bays] may have in [Carole's] estate" but made no mention of life insurance proceeds. Critically, Bays has pointed to no provision of the life insurance contracts dealing with spousal rights and there is good reason for this failure—it has long been Kentucky law that the dower/curtesy right of KRS 392.020 does not attach to life insurance proceeds. *Walker*, 246 S.W.2d at 140; *Farley*, 61 S.W.2d at 1061.

II. LIFE INSURANCE POLICY PROCEEDS ARE NOT AND SHOULD NOT BE SUBJECT TO A SURVIVING HUSBAND'S CURTESY INTEREST

A. Life insurance proceeds are not subject to the curtesy interest afforded by KRS 392.020 under well-reasoned Kentucky precedent and persuasive authority from other states

Bays attempts to characterize the Court of Appeals' decision as "carv[ing] out an exception to the dower statute (KRS 392.020)" but the statute says nothing about life insurance proceeds. Instead, KRS 392.020 states in relevant part:

> The survivor shall have an absolute estate in one-half (1/2) of the surplus personalty left by the decedent.

Therefore, the precise legal issue before this Court is whether life insurance proceeds payable to a third party beneficiary are "surplus personalty" of the decedent within the meaning of KRS 392.020 such that a surviving husband's curtesy interest attaches to the proceeds. This Court reviews the Court of Appeals' legal ruling on a legal question de novo. *McClendon*, 272 S.W.3d at 190. However, the principle of stare decisis directs this Court to "stand by" its previous precedents unless there are sound legal reasons to the contrary. *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984).

This Court has held on at least two prior occasions that the answer to the question of whether spousal rights attach to life insurance proceeds where a third party is the beneficiary is no. *Walker*, 246 S.W.2d at 140; *Farley*, 61 S.W.2d at 1061. Persuasively, the United States District Court for the Eastern District of Kentucky, applying Kentucky law, has held that the answer to this question is no. *Nelson,* 4 F.Supp.2d at 687. Other states, applying their own statutes similar to KRS 392.020, have held that the answer to this question is no. *Gleed v. Noon*, 614 N.E.2d 676 (Mass. 1993); *Bishop v. Eckard*, 607 S.W.2d 716 (Mo. Ct. App. 1980). The Court of Appeals correctly held that the answer to this question is no. Bays does not cite any authority whatsoever from any of the 50 states that answers this question otherwise.

Sound reasoning supports these precedents and the prior holdings should not be disturbed. Life insurance is a creature of contract, not personalty of the insured like certificates of deposit or stocks. Carole did not own or possess the proceeds during her lifetime because the proceeds were payable only upon her death and only to the beneficiary properly designated pursuant to the life insurance contract. She never accelerated the benefits or received the proceeds during her lifetime. Carole had absolute authority to change the beneficiary during her lifetime and did not need her husband's permission to do so. Because Carole never owned or possessed the proceeds, the proceeds were not "surplus personalty" of Carole within the meaning of KRS 392.020 and her husband's curtesy interest never attached to the proceeds. Because her husband's curtesy interest never attached to the proceeds, there could be no "fraud on the dower."[1] The Court of Appeals followed this simple and straightforward reasoning:

> the owners of a life insurance policy merely owns the contract, not the proceeds paid at the end of the policy; the beneficiary has no right to collect these assets until the death of the insured. There can be no fraud on [Bays'] curtesy interest when there was no curtesy interest in the life insurance proceeds to possess.

(Opinion, p. 10-11)

A detailed examination of Kentucky precedent supports the holding of the Court of Appeals. In *Farley*, the deceased changed the beneficiary of his life insurance policy

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1 Appellant repeatedly frames the question in terms of "fraud on the dower." However, as the Court of Appeals correctly recognized, John Bays, as a widower, had a curtesy interest, not a dower interest. (Opinion, p. 6 n.5) While the dower and curtesy interests function identically, Appellee will refer to the interest as a curtesy interest for the sake of accuracy and use the term "fraud on the dower" only where discussing the specifics of applicable precedents or Bays' argument.

from his estate to his children shortly before he died, his creditors and his surviving wife challenged the change as a fraud on their rights, and this Court—then sitting as the Court of Appeals—found no fraud on the dower and no fraud on the creditors' rights. 61 S.W.2d at 1061-62. This Court reasoned:

> Where the right to change the beneficiary is reserved by the insured, this right is a part of the contract from its inception, and may be exercised by the insured at any time before his death, for not until then does the right of the named beneficiary become vested.

Id. at 1061. *Farley* is directly on point.

Similarly, in *Walker*, the decedent had removed his wife as beneficiary in favor of his mother. 246 S.W.2d at 139. The surviving wife sought to assert a claim against the proceeds on the basis that she had actually procured and paid for the policy and therefore had certain marital rights with respect to the proceeds and the trial court ruled in the wife's favor. *Id.* at 140. This Court, applying the same principles it had articulated almost 20 years earlier in *Farley*, disagreed and held that the wife had no rights with respect to the proceeds:

> It is well settled that a designated beneficiary in a policy of insurance has no vested interest therein where the insured is authorized by the contract to change the beneficiary at his pleasure with the consent of the insurer.

Id.

Most recently, the United States District Court for the Eastern District of Kentucky rejected a claim of fraud on the dower against an insurance company by a surviving wife where the insured accelerated his death benefits or "cashed out" his policy shortly before his death. *Nelson*, 4 F. Supp.2d at 687. After detailed examination of *Walker* and *Farley*, the court reasoned:

> since [the widow] was a revocable beneficiary, she did not have a vested interest in the insurance policy. Thus, [the insurance company] could not have defrauded her out of anything because all it did was pay the insured the money that rightfully belonged to him.

Id. While this case has superficial differences from the case at hand because it involved a claim of fraud on the dower against the life insurance company only, the court's reasoning and holding are applicable here. The court noted that the widow could have had a claim against the husband's estate since he actually received (and presumably spent) the proceeds during his lifetime, but she did not have a claim for fraud on the dower against anyone by virtue of her "mere expectancy" of receiving the benefits. *Id.* & n.8. In other words, a claim for fraud on the dower may lie against the deceased's estate where the deceased cashed out the life insurance policy and actually possessed the proceeds during his lifetime, but a claim for fraud on the dower will not exist against anyone where it is premised on a change in beneficiary because the surviving spouse has a legally uncognizable expectancy interest that is always subject to defeasance. *See id.*

Persuasive and well-reasoned authority from other jurisdictions supports the conclusion that a surviving spouse's interest does not attach to life insurance proceeds. In *Bishop*, the Missouri Court of Appeals rejected an argument similar to Bays' and held that the deceased's daughter was entitled to life insurance proceeds free from any claim of the deceased's surviving wife:

> The proceeds of an insurance policy payable to a named beneficiary do not belong to the insured's estate. The beneficiary's claim to insurance proceeds is through the life insurance contract and not derivatively as the insured's heir. Since the daughter was the named beneficiary she is entitled to the proceeds of the policy.

607 S.W.2d at 717 (citations omitted). Similarly, in *Gleed*, the Massachusetts Supreme Court rejected an argument identical to that presented here. The court held that:

> A change of beneficiary on a policy or plan is not a conveyance, transfer, or disposal of the proceeds because they are not acquired until the death or retirement of the insured. A beneficiary's interest is a conditional interest subject to defeasance until the death of the insured. The beneficiary is only entitled to receive proceeds from a policy if the insured dies without changing the beneficiary designation.

614 N.E.2d at 500. The Court of Appeals relied on these persuasive decisions from other jurisdictions and Bays has failed to explain why these decisions should not be followed. (Opinion, p. 12-14)

Having been repeatedly challenged to cite authority from any of the 50 states where life insurance proceeds have been subject to a spousal claim, the only authority Bays offers is *Simpson v. Fowler*, 2014 WL 1601137 (Tenn. Ct. App., April 22, 2014), an unpublished non-precedential decision from Tennessee. In *Simpson*, husband separated from wife, they never divorced, husband changed the ownership of his bank account to a joint account with right of survivorship with his new female companion, and he changed the beneficiary on two small insurance policies purchased to cover funeral expenses from his estranged wife to his companion. *Id.* at *1. After husband's death, the wife and the companion litigated their rights with respect to the funds in the bank account, $28,000.00, and the insurance proceeds, $8,500.00. Eventually the trial court set aside the husband's transfer of the bank account and change of beneficiary in favor of the companion. *Id.* On appeal, the Tennessee Court of Appeals reversed the trial court's finding regarding the bank account, found no fraud on the dower, and held that the companion was entitled to the funds in the bank account. *Id.* at *11-*12.

The Tennessee Court of Appeals concluded as follows regarding the insurance proceeds:

> Concerning the proceeds from the insurance policy, it is undisputed that these proceeds were to be used for [the husband's] funeral. Yet, it is undisputed that [the estranged wife] paid for the funeral without using these funds. . . . Because the insurance proceeds were intended to cover the funeral expenses, and because [the estranged wife] bore these costs, we conclude that the trial court correctly awarded [the estranged wife] the $8,500.00 in insurance proceeds. In this regard, [the estranged wife] was reimbursed for her expenditures, and the insurance proceeds were applied to the funeral costs as [the husband] intended.

Id. at *11. Thus, the Tennessee Court of Appeals reached the common-sense result that insurance proceeds intended to fund a funeral should be used to reimburse the individual who actually paid for the funeral. The court's reasoning turned on unjust enrichment and quasi-contract principles. The Tennessee Court of Appeals did not hold that the husband's change of the beneficiary on the policy constituted fraud on the dower. It did not award the estranged wife one-half of the proceeds in recognition of her dower interest and allow the other one-half of the proceeds to pass to the companion, the named beneficiary. Based on the court's reasoning, the companion would have received all of the insurance proceeds of $8,500.00 if she had paid for the funeral expenses. Bays has failed to cite any authority whatsoever from any of the 50 states finding that a change of the beneficiary to a life insurance policy constitutes fraud on the dower.

The reasoning of *Simpson* actually undermines Bays' position. Here, there has never been any allegation that Carole purchased the life insurance policy from American General Life Insurance Company with a death benefit of $750,000.00 to fund burial expenses. Instead, Carole changed the beneficiary on the $750,000.00 policy to the Demand Right Irrevocable Trust for Bryce A. Bays to provide for her son after her death. She wanted her sister, as trustee, to manage the life insurance proceeds for her son. She did not want John Bays to control these funds. The unjust enrichment and quasi-contract principles at play in *Simpson* are not implicated here. Bays' curtesy interest never attached to the insurance proceeds and there could be no "fraud on the dower" here.

B. Life insurance proceeds are not inter vivos dispositions that can be "brought back into the estate."

Bays' argument that his curtesy interest attaches to life insurance proceeds calls for the proceeds to be automatically "brought back into the estate" so the curtesy interest can attach. Under Kentucky law, life insurance proceeds are not probate assets, are not required to be listed on probate inventory forms, do not become part of the deceased's estate unless the estate is named a beneficiary, and are payable directly to the named beneficiary upon the death of the insured. "If the insurance is payable to an individual beneficiary, it constitutes no part of the insured's estate." *Parks' Ex'rs v. Parks*, 156 S.W.2d 480, 483 (Ky. 1941) (holding that the owner of a life insurance policy cannot direct the payment of life insurance proceeds to his estate in his will in contravention of the beneficiary designation). Bays has never cited a Kentucky case where life insurance proceeds have been "brought back into the estate" and no Kentucky authority suggests his proposed revolutionary changes to Kentucky law should be adopted. This Court should follow *Parks*' holding that life insurance policy proceeds do not pass through the insured's estate where the policy names a beneficiary other than the estate because life insurance is a creature of contract and the death benefit proceeds are not personalty of the decedent owned during life.

Bays cites several Kentucky decisions where inter vivos transfers were undone and assets were brought back into an estate to satisfy a spousal interest. However, the Court of Appeals analyzed these precedents and properly distinguished them. In each case Bays cited, "the property actually existed and was possessed by the decedent."

(Opinion, p. 7); *see Harris v. Rock*, 799 S.W.2d 10 (Ky. 1990) (inter vivos transfer of cash into bank accounts held in joint tenancy with children brought back into estate and subject to spousal rights); *Anderson v. Anderson,* 583 S.W.2d 504 (Ky. App. 1979) (same); *Benge v. Barnett*, 217 S.W.2d 782 (Ky. 1949) (inter vivos gifts of cash amounting to approximately 45% of decedent's personalty brought back into estate and subject to spousal rights). Here, the Court of Appeals noted that comparing life insurance proceeds to joint bank accounts is "a comparison of apples and oranges" because life insurance proceeds are not personalty of the decedent possessed during life. (Opinion, p. 9-10) Bays does not address this key difference and he fails to explain why this Court should depart from its holding in *Parks* that "[i]f the insurance is payable to an individual beneficiary, it constitutes no part of the insured's estate." 156 S.W.2d at 483.

Bays' argument that life insurance proceeds may be "brought back into the estate" to satisfy the claim of a surviving spouse essentially has two substantive subparts—(1) life insurance proceeds constitute personalty of the decedent to be used in calculating a widower's surviving share and (2) if the estate's assets are insufficient to satisfy the widower's share, then the life insurance proceeds must be diverted from the named beneficiary to the estate to satisfy the widower's claim. For reasons discussed at length *supra*, this Court should reject Bays' first argument. However, even if his first argument had merit—which it does not—it does not necessarily follow that any portion of the surviving spouse's share that the estate is incapable of satisfying should be paid from life insurance proceeds at the expense of the named beneficiary. While Bays' argument focuses on the first point and largely assumes the second, there is absolutely no Kentucky authority whatsoever to support diversion of life insurance proceeds from the named beneficiary to the estate to satisfy a claim made against the estate. Bays' approach impermissibly seeks to make the beneficiary liable for a debt of the estate. In essence, Bays invites this Court to rewrite Carole's life insurance contract and make two radical changes in Kentucky law that would fundamentally change the nature of life insurance, probate, and estate planning. This Court should decline Bays' invitation.

While Bays couches his argument in terms of protecting the surviving spouse by bringing the proceeds back into the estate, surviving spouses in many instances may be worse off if Bays' proposed change to the law were adopted. Under current Kentucky law, creditors ordinarily cannot reach life insurance proceeds unless the estate of the deceased is named the beneficiary. However, if proceeds were brought back into the estate, then they would be subject to the claims of creditors. For instance, suppose a businessman dies during a downturn in his business and leaves $1 million in assets and $2 million in personally guaranteed business debts. His estate would be insolvent and the beneficiaries under his will would take nothing except for the small amount that would be exempt. The businessman knew this scenario was possible and he provided for his spouse, and possibly children or others, by purchasing life insurance with a death benefit of $1 million. Under Bays' approach of "bringing back in" the life insurance to the estate, the businessman's creditors would take the life insurance proceeds and the beneficiaries, including the surviving spouse, would take nothing.

C. Other Arguments

Bays disputes the Court of Appeals' conclusion that subjecting life insurance proceeds to a surviving spouse's interest would "create chaos in the realm of estate planning" and place insurance companies in "an untenable position of honoring the contract of an insured in the face of a dower or curtesy claim by a surviving spouse." (Opinion, p. 15) Bays contends that the recipient of the assets subject to the spousal interest would be "subject" to the spouse's claim if fraud occurs and the insurance company or other payor of the asset would not face a claim or otherwise be burdened.

However, Bay's approach would put Kentucky law at odds with the law of other states. Under Bays' approach, life insurance companies would have to notify policyholders in Kentucky that they, apparently unlike policyholders in any other state, would have to have express written spousal consent to name anyone other than the spouse as a beneficiary or else the beneficiary could be sued by the surviving spouse, as happened here. Individuals moving to or from Kentucky would require special estate planning to address Kentucky's deviation from the apparent consensus. Even more problematically, life insurance companies would have to interplead the proceeds whenever an insured names someone other than a spouse as beneficiary without first obtaining express written spousal consent. The proceeds would be subject to the decedent's creditors by virtue of being "brought back in" to the estate contrary to this Court's sound ruling in *Parks*, 156 S.W.2d at 483, and would be subject to the beneficiary's claim. Life insurance companies would be left to sort out the mess at their own expense, identify all potential parties and interplead the money, or face claims that they wrongfully paid or withheld proceeds from the deceased's estate, creditors of the estate, the beneficiary, the surviving spouse, and possibly others.

The dissent in the Court of Appeals put forth a hypothetical in support of its reasoning that is not applicable to this case. In the dissent's hypothetical, the husband pays substantially all of his assets to the insurance company in the form of premiums on the eve of marriage and names a third party as beneficiary. The payment is problematic because the husband used substantially all of his assets to purchase \$0.95 of coverage for every \$1.00 he spent, wasting \$.05 per \$1.00 in the face of certain death. In this hypothetical, the fraud on the dower occurs because the husband transfers substantially all of his assets in a wasteful manner on the eve of marriage in an attempt to prevent his wife's dower interest from attaching to his assets, not because he named a third party as beneficiary of the life insurance policy.

Here, by contrast, Carole did not waste assets to purchase the life insurance policy. Here, by contrast, Carole did not use substantially all of her assets to purchase life insurance on the eve of her marriage or the eve of her death to prevent Bays' curtesy interest from attaching. Instead of abandoning "hornbook law" to address the extreme scenario presented by the hypothetical, courts could fashion other remedies where there has been a wrongful expenditure of substantially all of the assets on the eve of marriage or death. *See Harris*, 799 S.W.2d at 11 ("the widow's right to dower cannot be defeated by a gift by her spouse of all, or more than one-half, of his property to another with the intent to defeat the claims to dower."). The dissent's hypothetical is inapplicable to the facts presented here and does not present grounds to abandon this Court's precedents in *Walker* and *Farley*.

CONCLUSION

Adopting Bays' approach would have far-reaching and problematic consequences, it would place Kentucky at odds with the law in other jurisdictions, it would create uncertainty in the law, it would generate much litigation, it would require this Court to overrule numerous prior decisions, it would subject life insurance policies to the claims of the creditors of the decedent, radically altering Kentucky law and damaging the interests of surviving spouses and others in many instances, and it would place an enormous burden on life insurance companies doing business in Kentucky. For these reasons, this Court should decline Bays' invitation to change Kentucky law and should affirm the Court of Appeals' Opinion.

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